



Advanced Topics in Standard of Review in Immigration Appeals

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Standard of Review: Board Review of Decisions of Immigration Judges

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AGENDA

- BIA standard of review for reviewing an IJ's decision
- De Novo
 - What is it?
 - When does it apply?
- Clear error
 - What is it?
 - How is it effectively employed?
 - What is a fact?
- Mixed questions of law and fact/hybrid review

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STANDARD OF REVIEW

- amount of deference given by one court when reviewing the decision of another court
- strictness or intensity of an appellate court's review

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STANDARD OF REVIEW

- determines how we assess the IJ's decision
- if the correct standard of review is not employed, we will likely get it back from the federal court

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8 C.F.R. § 1003.1(d)(3)(i)

Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are **clearly erroneous**.

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8 C.F.R. § 1003.1(d)(3)(ii)

The Board may review **questions of law, discretion, and judgment** and all other issues in appeals from decisions of immigration judges *de novo*.

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DE NOVO REVIEW

- review is “anew” and unfettered
- Board can substitute judgment
- but if we agree with IJ, can affirm decision for reasons therein

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DE NOVO REVIEW

questions of law

- is a conviction for an aggravated felony, CIMT?
- whether a particular adjudication amounts to a conviction under section 101(a)(48)(A) of the Act

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DE NOVO REVIEW

questions of law

- does mistreatment equal torture?
- is crime particularly serious?

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DE NOVO REVIEW

questions of **discretion**

- applications, e.g.; cancellation, asylum, adjustment, voluntary departure
- balancing of the equities
- selection and implementation of safeguards for mentally incompetent aliens

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DE NOVO REVIEW

questions of “**judgment and all other issues**” in appeals from decisions of IJs

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WHAT IS CLEAR ERROR?

- highly deferential, and requires more than the Board simply disagreeing with the IJ
- where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous

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WHAT IS CLEAR ERROR?

- no evidence to support finding of fact
- finding controverted by indisputable evidence
- IJ misunderstood testimony of witness
- evidence opposed to claimant's version, although not indisputable, has overwhelming persuasive force

Lin v. Lynch, 813 F.3d 122 (2d Cir. 2016)

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USING CORRECT TERMINOLOGY

- standard language paragraph not enough
- employ proper terminology throughout analysis
- “disagree” does not mean clear error
- “agree” does not mean no clear error
- no “reversible error” standard

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EMPLOYING CLEAR ERROR STANDARD

- cannot set aside the IJ’s findings just because we disagree
- cannot just “find” the evidence indicates something different than what the IJ found
- need to provide a meaningful explanation which comports with limits of review

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WHAT ARE “FACTS”?

Something that actually exists; an aspect of reality; includes not just tangible things, actual occurrences or relationship, but also states of mind such as intentions and the holding of opinions.

Black's Law Dictionary 2014

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WHAT ARE “FACTS”?

An actual or alleged event or circumstance, as distinguished from its legal effect, consequence or interpretation.

Black's Law Dictionary 2014

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EXAMPLES OF FACTS

- credibility determinations
- states of mind, intentions, opinions
- establishing what happened
- whether an event occurred on, before, or after a certain date

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FACTS

- whether an alien is competent to participate in removal proceedings
- false testimony with subjective intent of obtaining immigration benefits

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FACTS

- what is likely to happen to R upon return to native country
- motivation of persecutor
- internal relocation
- is government unable/unwilling
- content of foreign law

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MIXED QUESTIONS OF LAW & FACT

- issue is not purely factual or legal
- hybrid determination with bifurcated standard of review
- defer to factual findings of IJ, but apply *de novo* review to legal conclusions based on those facts

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MIXED QUESTIONS

COR/EEUH

- clear error: what R claims is EEUH to qualifying relative & whether relative is a qualifying relative
- de novo: whether those facts as determined by IJ and found not be clearly erroneous amount to EEUH

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MIXED QUESTIONS

Firm Resettlement

- clear error: IJ's findings of fact leading to the determination whether an alien was firmly resettled
- de novo: whether facts support determination that an alien has firmly resettled within the meaning of 208(b)(2)(A)(iv) and regulations

***Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011)**

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MIXED QUESTIONS

Myrie v. Att'y Gen. of U.S. (3d Cir.)

- CAT claim from Panama
- R feared gangs; attacked in past; claimed police would not help
- IJ finds no government acquiescence
- BIA: no clear error in IJ's findings that government of Panama would not be acquiescent to any torture

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MIXED QUESTIONS

COA: mixed question of fact and law

- assess for clear error the IJ's underlying findings such as whether government actively engages against gangs and what happened in past, such as whether applicant reported past attacks
- review *de novo* whether findings establish acquiescence, including the concept of willful blindness

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MIXED QUESTIONS

***Upatcha v. Sessions* (4th Cir.)**

- § 216 good faith waiver at issue
- IJ concludes R not credible, and evidence in total does not indicate a good faith marriage
- BIA: upholds IJ, stating that whether a marriage is entered into in good faith is a factual question and denial of waiver is reviewed for clear error

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MIXED QUESTIONS

COA: mixed question of law and fact

- factual determinations made by an IJ, e.g., what occurred, as well as credibility of applicant, are reviewed for clear error
- ultimate legal judgment whether the good faith standard has been met, which involves applying the legal standard for good faith marriage to the facts, is reviewed *de novo*

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DISCRETION

Discretion:

- review underlying facts for clear error; generally the R's equities, including:
 - family ties, employment history, health assessments, credibility, sincerity, remorse, nature of respondent's criminal activities
- the discretion or judgment based on those findings of fact, and weight accorded to individual factors, may be reviewed *de novo*

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SUMMARY

- two standards of review: *de novo* or clear error
- *de novo* applies to questions of law, discretion and judgment
- *de novo* review is without restriction
- clear error applies to factual findings
- clear error is much more limited review
 - use correct terminology
 - if finding clear error, employ meaningful analysis
- recognize mixed questions of fact and law
- correctly employ hybrid standards of review

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Standard of Review: Circuit Court Review

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Circuit Court Review

"Court/Court Review"

- Review of Federal district courts

"Agency/Court Review"

- PFRs from Board decisions

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Circuit Court Review

“Court/Court Review”

- De novo
- Clear error (facts by judge)
- Substantial evidence (facts by jury)
- Abuse of discretion

“Agency/Court Review”

- De novo
- Substantial evidence (all facts)
- Abuse of discretion

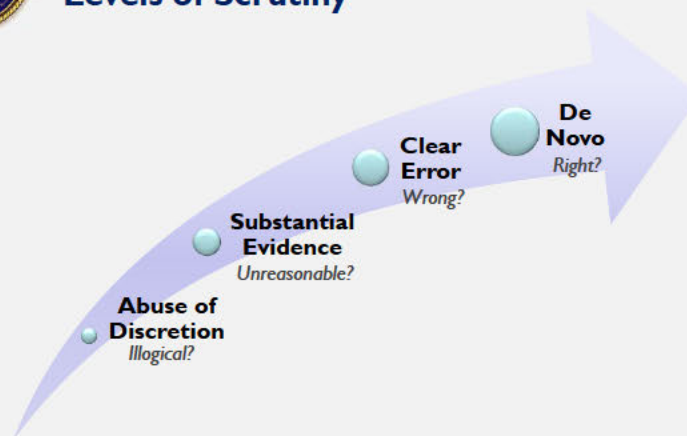
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Circuit Court Review: Levels of Scrutiny



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Factual Review: Compared



Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) (substantial evidence review)
United States v. U.S. Gypsum Co., 333 U.S. 364 (1948) (clear error review)

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Recap

- ✓ Different standards of review in "court/court review" than "agency/court review"
- ✓ Circuit standards \neq Board standards
 - Facts (clear error vs. substantial evidence)
 - Discretion (de novo vs. abuse of discretion)

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Practical Significance – #1

Sources of Research

- Where to look for cases discussing/applying the clear error standard?
- Most relevant research likely to come from “court/court review” decisions, where circuits also employ clear error review

See, e.g., *Anderson v. City of Bessemer*, 470 U.S. 564 (1985)

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Practical Significance – #2

Decision Drafting

- Using correct language signals to reader (parties, OIL attorney, reviewing circuit, etc.) that we are applying proper standard
- Avoid use of phrases unique to circuit standards of review
 - *E.g., the evidence compels, substantial evidence supports, abuse of discretion, arbitrary and capricious, reversible error*

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Practical Significance – #2

Decision Drafting

- Citing to/relying on circuit decisions
 - *XYZ v. U.S. Att’y Gen.*, 123 F.3d 456 (12th Cir. 2018) (upholding ACF based on implausible testimony)
 - *XYZ v. U.S. Att’y Gen.*, 123 F.3d 456 (12th Cir. 2018) (holding that implausible testimony undermines credibility)
 - **Avoid:** *XYZ v. U.S. Att’y Gen.*, 123 F.3d 456 (12th Cir. 2018) (finding ACF based on implausible testimony to be supported by substantial evidence)

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Practical Significance – #3

Identifying Factual & Legal Issues

- Like the Board, circuits must distinguish between facts/law to determine whether to apply de novo or substantial evidence review
- Circuits also do a facts vs. law determination in jurisdiction analysis
 - e.g., INA §§ 242(a)(2)(C), (D)

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Practical Significance – #3

Identifying Factual & Legal Issues

- A word of caution ...
- *E.g., Xue v. Lynch*, 846 F.3d 1099 (10th Cir. 2017)
(noting the “odd” practice that exists regarding the question of whether past harms rise to the level of persecution, where the circuits “review for substantial evidence a determination the BIA itself has concluded is legal in nature”)

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Conclusion

- ✓ Identify whether the issue being reviewed is legal or factual
- ✓ Language choice can be just as important as announcing the correct standard
- ✓ Circuit decisions may dictate or otherwise aide in determining whether an issue is factual or legal
- ✓ Be mindful of different standards in circuit cases

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